IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Second Appeal No. 1576 of 2001
(Old No. 327 of 1982)

1. The State
2. Regional Food Controller,
   Kumaun Range, Haldwani.

…… Defendants / Appellants

Versus

Firm Kalyan Rice Mill Kashipur
District Nainital through its Partner
Sri Kalyan Singh S/o Sri Shanker Singh,
R/o Kalyan Rice Mill, Chaitee Turning,
Kashipur, District Nainital.

……. Plaintiff / Respondent

Mr. Nand Prasad, learned Standing Counsel for the State.
None for the respondent.

Hon'ble Prafulla C. Pant, J.

This is application No. 13431 of 1982 for condoning the delay in filing this Second Appeal against the judgment dated 24.03.1982 and decree dated 05.04.1982, in Civil Appeal No. 79 of 1981, by the learned Additional District Judge, Nainital.

2) Heard.

3) This appeal was presented before the Allahabad High Court on 25.08.1982. There was delay of 49 days in filing the appeal. Delay in filing the appeal is sufficiently explained in the affidavit of Shyam Singh, the then Marketing Inspector, Kashipur. Therefore the delay

condonation application is allowed. Delay in filing the appeal is condoned.

4) Also, heard on admission.

5) This appeal has arisen out of the Original Suit No. 08 of 1981, which was decreed for recovery of Rs. 15,521.25 with costs, on June 8, 1981, by learned Civil Judge, Nainital. It appears that the defendant (State) preferred appeal against said judgment and decree before the first appellate court and the first appellate court after hearing the parties, dismissed the appeal on 24.03.1982.

6) Brief facts of the case are that the plaintiff (present respondent) supplied rice under order of the defendants at the rate of Rs. 132/- per quintal. Later on, State Government with retrospective effect directed that the price should be paid to the plaintiff at the rate of Rs. 127/- per quintal. Hence, the plaintiff filed suit against the defendants, after giving notice under Section 80 of the Code of Civil Procedure, 1908 (hereinafter referred as the Code) for recovery of Rs. 15,521.25. Defendants failed to file their written statement and the suit was decreed under Order VIII Rule 10 for the Code. In the first appeal also the decree passed by the trial court was upheld as it was found that even after being given several opportunities, the defendants did not file the written statement and the provision for Order VIII Rule 10 got attracted. <u>There is no substantial question of law involved in this appeal.</u>

7) Learned Standing Counsel for the appellants argued that the evidence was not taken before passing the

impugned judgment and decree by the trial court. The argument of learned counsel for the appellants is misconceived. Had the defendants' counsel not been present on the date fixed, the trial court would have proceeded ex-parte under Order XVII of the Code, and in that case the trial court was required to direct the plaintiff to adduce evidence. But where the party is present and does not file written statement, the contents of the plaint stand admitted and, as such, the judgment pronounced under Order VIII Rule 10 and the decree based there under cannot be said to be illegal for want of recording of evidence.

8) In view of the above discussion, the appeal is dismissed in limine.

(Prafulla C. Pant, J.)

Dt. 29th August, 2006.
H.Negi